

Contractor Challenges to the Government's Evaluation of Past Performance During the Source-Selection Process: "Thou Protesteth Too Much?"

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Introduction

The evaluation of contractor past-performance is a critical part of the source-selection process. Just as most Americans would consider a vendor's reputation for excellence before buying goods or services,¹ the government now recognizes the common sense notion that choosing contractors with good track records reduces the risk of nonperformance.² Gone are the days, at least in theory, when poor performers were repeatedly rewarded with new government contracts.

Since 1995, the Federal Acquisition Regulation (FAR)³ has required the evaluation of contractor past-performance during source-selection on all competitively negotiated contracts expected to exceed \$100,000.⁴ This regulatory revision came on the heels of acquisition reform legislation in which Congress recognized the importance of past-performance in the source-selection process.⁵ Together, these statutory and regulatory changes intensified a thirty-year effort to evaluate contractor past-performance during source-selection.⁶ Now, all agencies governed by the FAR are examining the past-performance of

offerors and letting the offerors' past records drive the source-selection, rather than awarding contracts to the parties that "bluff" the best in their technical proposals.⁷ Indeed, Office of Federal Procurement Policy (OFPP) guidance suggests that past-performance should normally be weighted *at least twenty-five percent* of the total evaluation criteria, or equal to other non-cost evaluation factors.⁸ Agencies are even free to consider only price and past-performance as evaluation factors in best-value acquisitions.⁹ Without question, past-performance has been, and will continue to be, the deciding factor in many source-selections.

To support the evaluation of past-performance during source-selection, agencies are required to assess contractor performance at the conclusion of every government contract exceeding \$100,000.¹⁰ Agencies, however, are not limited to these reports when evaluating past-performance. Agencies are free to use any "relevant information"¹¹ regarding a contractor's performance under previously awarded contracts, including information derived from the personal knowledge of the evaluators.¹²

1. See generally STEVEN KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* 39 (1990) (stating that the use of past-performance to predict future performance is "so common that people would hardly go about their daily lives without it").

2. See Office of Federal Procurement Policy (OFPP) Policy Letter 92-5, 58 Fed. Reg. 3573 (1993) (stating that a contractor's past-performance is a "key indicator for predicting future performance"); Steven Kelman, *Past Performance: Becoming Part of the Solution*, 30 *PROCUREMENT LAW* 12 (Winter 1995) (OFPP Director describes the philosophy behind governmental efforts to use past-performance in awarding contracts as "nothing but common sense"); Ralph C. Nash & John Cibinic, *Postscript: Past Performance*, 8 *NASH & CIBINIC REP.* ¶ 33, at 83 (June 1994) ("All other things being equal, award to an offeror with good [past-performance] is less risky than award to one with an inferior record.").

3. GENERAL SERVS. ADMIN. ET AL., *FEDERAL ACQUISITION REG.* (June 1997) [hereinafter FAR].

4. See FEDERAL ACQUISITION CIR. NO. 90-26, 60 Fed. Reg. 16,718 (1995) [hereinafter FAC 90-26] (amending, *inter alia*, FAR pt. 15, effective 31 May 1995). The FAC 90-26 established phase-in milestones for agencies to implement this requirement. Full implementation occurred on 1 January 1999. See FAR, *supra* note 3, § 15.304(c)(3)(ii). Note, however, that the contracting officer is not required to evaluate past-performance if he "documents the reason past-performance is not an appropriate evaluation factor for the acquisition." *Id.* § 15.304(c)(3)(iv). This may be appropriate when using the "lowest price technically acceptable" source-selection process. See *id.* § 15.101-2(b)(1).

5. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 (recognizing that past-performance "is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract," and mandating the implementation of guidance to achieve this result).

6. Comptroller General decisions reflect an agency practice of evaluating past-performance as early as the 1960's. See, e.g., *To Educ. Svcs.*, B-156860, 1965 U.S. Comp. Gen. LEXIS 2365 (July 26, 1965); *To Aerojet-Gen. Corp.*, B-165488, 1969 U.S. Comp. Gen. LEXIS 3105 (Jan. 17, 1969).

7. See OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, *BEST PRACTICES FOR USING CURRENT & PAST PERFORMANCE INFORMATION* 4 (Mar. 2000) [hereinafter OFPP GUIDE] (describing how the government's practice of relying upon detailed technical proposals to select offerors for contract award allows offerors that can write outstanding proposals, but have "less than stellar performance," to win contracts).

8. *Id.* at 17.

9. *Id.*; see also *Aqua-Chem., Inc.*, Comp. Gen. B-249516.2, May 18, 1993, 93-1 CPD ¶ 389.

As logical as the use of past-performance in the source-selection process may appear, the adoption of this new rule in 1995 was not without controversy. Contractors and legal practitioners have repeatedly expressed concern that the mandatory evaluation of past-performance will result in erroneous, unfair, or biased source-selections, thus undermining the very gains that the government hopes to achieve by this process.¹³ To back up these concerns, contractors have used the protest process¹⁴ vigorously.¹⁵

The evaluation of past-performance during the source-selection process has provided protesters with a “target-rich” environment. Contractors have challenged not only the procedures used by agencies when evaluating past-performance, but also the substance of those evaluations. A surprising number of these challenges have resulted in successful protests.¹⁶

When deciding a case involving a past-performance evaluation, the General Accounting Office (GAO) considers three “bedrock principles”—reasonableness, fairness, and consistency.¹⁷ While these principles apply to any case involving the government’s evaluation of an offeror’s proposal, they are

especially crucial to past-performance evaluations. By their very nature, past-performance evaluations are highly subjective. Agencies have enormous discretion when rating an offeror’s performance.¹⁸ Not surprisingly, offerors frequently disagree with these ratings, instinctively believing that their performance is better than evaluated. This creates a recipe for conflict, which is only likely to increase as the government increases its efforts to use past-performance in source-selections. It is, therefore, doubly important for procurement officials to be reasonable, fair, and consistent when evaluating contractor past-performance.

This article examines protest cases involving past-performance evaluations arising since the 1995 revisions to the FAR. A review of these protests reveals common mistakes that agencies make during the source-selection process. This article analyzes protest cases in the context of eight “problem areas,” and suggests questions that procurement officials should ask when evaluating past-performance. When properly answered, these questions should assist the contracting officer in making a fair, reasonable, and legally supportable source-selection.

10. FAR, *supra* note 3, § 42.1502(a). Agencies are encouraged to assign contractors one of five ratings on these assessments: exceptional, very good, satisfactory, marginal, or unsatisfactory. See OFPP GUIDE, *supra* note 7, at 11. Note, however, that agencies need not evaluate contractor performance for contracts awarded in accordance with FAR subparts 8.6 (Acquisitions from Federal Prison Industries, Inc.) and 8.7 (Acquisitions from Nonprofit Agencies Employing People Who are Blind or Severely Disabled). For construction and architect/engineer contracts, agencies evaluate contractor performance in accordance with FAR part 36. The U.S. Army Corps of Engineers operates two automated centralized databases to collect performance information on construction and architect-engineer contracts. See *id.* at 9.

11. Past-performance information is defined as:

[r]elevant information, for future source-selection purposes, regarding a contractor’s actions under previously awarded contracts. It includes, for example, the contractor’s record of conforming to contract requirements and to standards of good workmanship; the contractor’s record of forecasting and controlling costs; the contractor’s adherence to contract schedules, including the administrative aspects of performance; the contractor’s history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor’s business-like concern for the interest of the customer.

FAR, *supra* note 3, § 42.1501. The OFPP encourages agencies to rely on existing documentation from federal systems “to the maximum possible extent.” OFPP GUIDE, *supra* note 7, at 19. However, where such information is not readily available, agencies may conduct a survey or phone interviews to verify past-performance, or ask the offeror to submit references. *Id.*

12. See *Seattle Sec. Servs., Inc. v. United States*, 45 Fed. Cl. 560, 568 (1999).

13. See, e.g., William W. Goodrich, *Past Performance as an Evaluation Factor in Public Contract Source Selection*, 47 AM. U. L. REV. 1539, 1542 (1998) (stating that past-performance evaluations create the risk of “de facto debarments” and “unjust retaliation against contractors”); *ABA Group Calls for Rules Changes to Let Contractors Participate in the Evaluation Process*, 71 FED. CONT. REP. (BNA) No. 20, at 686 (May 17, 1999); *More Guidance Needed on Implementing Past Performance Evaluation*, 66 FED. CONT. REP. (BNA) No. 19, at 490 (Nov. 18, 1996); John S. Pachter & Jonathan D. Shaffer, *Past Performance as an Evaluation Factor—Opening Pandora’s Box*, 38 GOV’T CONTRACTOR ¶ 280 (June 12, 1996).

14. Contractors may file a protest with the procuring agency, the General Accounting Office (GAO), or the Court of Federal Claims. See 28 U.S.C. § 1491 (2000) (court); 31 U.S.C. §§ 3551-3556 (2000) (GAO); FAR, *supra* note 3, pt. 33 (agency).

15. See Goodrich, *supra* note 13, at 1561 (stating that from 1993 to 1998, past-performance issues “played an important role in the outcome of approximately 500 GAO decisions”); Ralph C. Nash & John Cibinic, *Past Performance Evaluations: Are They Fair?*, 11 NASH & CIBINIC REP. ¶ 21 (May 1997) (finding “a lot of protests on the evaluation of contractor past-performance”).

16. Based on the author’s informal survey, the GAO has sustained over thirty protests involving past-performance evaluations between 1996-2001. The Court of Federal Claims, whose volume of protest cases is significantly smaller than the GAO, has sustained only a few. This article focuses primarily on decisions of the GAO.

17. See *Wind Gap Knitwear, Comp. Gen. B-261045*, June 20, 1995, 95-2 CPD ¶ 124.

18. See Goodrich, *supra* note 13, at 1572 (stating that the GAO has “repeatedly applied” the principle that it will approve an agency’s past-performance evaluation so long as it is reasonable and consistent with the evaluation criteria).

Problem Area #1: Have I Told the Contractor That He Is “Damaged Goods?”

Agencies are required to conduct discussions with all offerors in the competitive range.¹⁹ The GAO has long required these discussions to be “meaningful.”²⁰ To be meaningful, discussions must identify the weaknesses in a proposal that preclude the offeror from having a reasonable chance for award,²¹ and must point to sections of the proposal requiring “amplification or revision.”²²

While one might naturally think that such “weaknesses” in a proposal would include adverse past-performance information, this was generally not the case before 1995. In fact, the GAO typically excused agency failure to discuss adverse past-performance information by holding that such information was “historical information” not likely to be changed during discussions.²³

This changed dramatically with the advent of Federal Acquisition Circular (FAC) 90-26.²⁴ Among other things, this FAC amended the FAR to require contracting officers to address past-performance information during discussions with offerors in the competitive range, to the extent that offerors had not had a previous opportunity to comment on the information.²⁵

With this new rule in place, the GAO did an “about face” and started routinely sustaining protests whenever the protester could show that the agency failed to provide the protester an

opportunity to discuss and comment upon adverse past-performance information. For example, in *McHugh/Calumet, a Joint Venture*,²⁶ an offeror protested the General Services Administration’s (GSA) failure to discuss adverse past-performance information arising from a previous GSA contract.²⁷ Rather creatively, the GSA responded that the FAR requires discussions only with respect to information obtained from third-party sources, rather than internal agency information, since such internal information is “unlikely to be misinterpreted.”²⁸ The GAO was not persuaded by this argument. The GAO found nothing in the language of the FAR or the statutory provisions governing past-performance information that would exempt internal agency information from the requirement to hold discussions.²⁹

The GAO also has been largely unsympathetic to agency attempts to show that the protester “should have known” about the adverse past-performance information and, therefore, already had an opportunity to respond. In *Aerospace Design & Fabrication, Inc.*,³⁰ the agency acknowledged that it did not discuss the adverse information directly with the protester, but argued that the protester had an opportunity to rebut the same information during award fee discussions on a previous contract. The protester, however, was only a subcontractor on the previous contract. Not surprisingly, the GAO found that the award fee discussions with the prime contractor did not provide a meaningful opportunity for the protester to respond to the adverse information.³¹ Similarly, in *McHugh/Calumet*,³² the agency asserted that the protester had a previous opportunity to

19. FAR, *supra* note 3, § 15.306(d).

20. See Dep’t of the Navy—Reconsideration, Comp. Gen. B-250158.4, May 28, 1993, 93-1 CPD ¶ 422.

21. *Id.*

22. Davies Rail & Mech. Works, Inc., Comp. Gen. B-283911.2, Mar. 6, 2000, 2000 CPD ¶ 48.

23. See, e.g., JCI Envtl. Servs., Comp. Gen. B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299; Bendix Field Eng’g Corp., Comp. Gen. B-241156, Jan. 16, 1991, 91-1 CPD ¶ 44. *But see* Alliant Techsystems, Inc.; Olin Corp., Comp. Gen. B-260215.4, Aug. 4, 1995, 95-2 CPD ¶ 79 (rejecting agency characterization of proposed subcontractor’s adverse past-performance information as “merely historical information that could not be changed and which was not required to be mentioned during discussions”).

24. FAC 90-26, *supra* note 4 (amending FAR, *supra* note 3, pts. 9, 15, 42) (31 Mar. 1995)).

25. See *id.* at 16,719 (codified as amended at FAR, *supra* note 3, § 15.306(d)(3)).

26. Comp. Gen. B-276472, June 23, 1997, 97-1 CPD ¶ 226.

27. *Id.* at 1. The GSA had assessed the protester’s performance on a federal building renovation contract as below average or poor due to a “negative working relationship” and an “adversarial and opportunistic” attitude. *Id.* at 5-6.

28. *Id.* at 7.

29. The GAO noted that 41 U.S.C. § 405(j)(1)(c)(i) explicitly requires discussion even of adverse past-performance information generated internally within the agency. *Id.*

30. Comp. Gen. B-278896.2, May 4, 1998, 98-1 CPD ¶ 139.

31. *Id.* at 15-16.

32. Comp. Gen. B-276472, June 23, 1997, 97-1 CPD ¶ 226.

comment on its performance during the course of the GSA project because the problems were “common knowledge,” and because the GSA had expressed dissatisfaction with its performance throughout the contract.³³ The GAO rejected this assertion because the agency could produce no documentary evidence that the protester was ever notified of its adverse performance or should have even been aware of it.³⁴

The lesson from these cases is clear: agencies should err on the side of discussing any arguably adverse performance information with the offerors. The contracting officer must be especially sensitive to information received through surveys, telephone calls to other agencies, or from members of the evaluation team. The contracting officer must review this information and identify any adverse past-performance information on which the offeror has not previously commented, and notify the offeror of this information during discussions. The contracting officer should also ensure that contractor performance reports prepared by agencies at the conclusion of contract performance include contractor rebuttal to any adverse information, as required by FAR part 42.

A question naturally arises—when is past-performance information considered “adverse” such that it triggers the requirement to conduct discussions? The answer is simple: anything that results in a less than excellent score during proposal evaluation is adverse and should be discussed. In *GTS Duratek, Inc.*,³⁵ the Navy received a past-performance survey for one of the protestor’s recent contracts—after the protest had already been filed. The survey contained several negative comments. The Navy re-evaluated the protestor’s past-performance and determined that the protester should retain the same

rating of good. The Navy, however, failed to discuss the past-performance survey with the protester. The GAO found that the protester was “unquestionably entitled to comment” on the survey because of the negative comments it contained.³⁶ The GAO sustained the protest, reasoning that the protester might have been able to improve its past-performance rating if the Navy had engaged it in meaningful discussions.³⁷

As with other evaluation errors, the GAO will test agency failure to discuss adverse past-performance information for prejudice. If the agency can convince the GAO that any rebuttal comments would not have affected the source-selection decision, the GAO will not grant relief.³⁸ More often than not, however, the GAO is unable to conclude that the protester would not have had a reasonable possibility of receiving the award but for the failure to discuss the adverse information.³⁹

In addition to conducting discussions with all offerors in the competitive range, agencies must not overlook offerors considered, but rejected, for the competitive range. Agencies are required to conduct “communications” with offerors whose past-performance is the “determining factor” keeping them out of the competitive range.⁴⁰ These communications must include “adverse past-performance information to which the offeror has not previously had an opportunity to comment.”⁴¹

Should agencies alert offerors to adverse past-performance information when the agency intends to award the contract *without* discussions?⁴² Generally, this is not required.⁴³ The contracting officer enjoys broad discretion whether to “clarify” adverse past-performance information.⁴⁴ This discretion is not

33. *Id.* at 7.

34. *Id.* at 8. The FAR requires contracting activities to evaluate contractor performance on SF-1420 for each construction contract in excess of \$500,000. FAR, *supra* note 3, § 36.201. For non-construction or architect-engineer contracts, the FAR requires agencies to prepare evaluations of contractor performance for each contract in excess of \$100,000 at the time the work is completed. *Id.* § 42.1502. The contractor is entitled to thirty days to submit rebuttal comments. *Id.* § 42.1503. The GAO’s decision did not explain whether GSA followed these procedures for the federal building procurement.

35. Comp. Gen. B-280511.2, Oct. 19, 1998, 98-2 CPD ¶ 130.

36. *Id.* at 14.

37. *Id.*; see also *Aerospace Design & Fabrication, Inc.*, Comp. Gen. B-278896.2, May 4, 1998, 98-1 CPD ¶ 139 (finding that the agency was required to discuss adverse past-performance information with the protester despite giving protester an overall score of good, and despite the source-selection official raising the score to very good).

38. See, e.g., *Black & Veatch Special Projects Corp.*, Comp. Gen. B-279492.2, June 26, 1998, 98-1 CPD ¶ 173. To prevail in federal court, protesters must also show prejudice. See *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996).

39. See, e.g., *Biospherics, Inc.*, Comp. Gen. B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161.

40. FAR, *supra* note 3, § 15.306(b)(1)(i).

41. *Id.* § 15.306(b)(4).

42. The FAR provides that when an agency intends to award without discussions, the offerors *may* be given the opportunity to clarify the relevance of adverse past-performance information to which the offeror has not previously had an opportunity to respond. FAR, *supra* note 3, § 15.306(a).

43. See *Rohmann Servs., Inc.*, Comp. Gen. B-280154.2, Nov. 16, 1998, 98-2 CPD ¶ 134 (upholding contracting officer’s decision to award contract without offering the protester the opportunity to respond to adverse past-performance information).

absolute, however. In *A.G. Cullen Construction, Inc.*,⁴⁵ the GAO held that when there is a “clear basis” to question the validity of the adverse past-performance information, the contracting officer must provide the offeror an opportunity to clarify the information before awarding a contract without discussions. For example, if there are “obvious inconsistencies” between a reference’s narrative comments and the numerical ratings assigned to the offeror, the contracting officer must clarify those inconsistencies.⁴⁶ Aside from these rare cases, however, the contracting officer is not required to clarify adverse past-performance information before awarding without discussions.⁴⁷

Although not required, prudence dictates that the contracting officer should go beyond the GAO’s minimal requirements and seek clarification whenever the offeror has not had a prior opportunity to comment and the adverse past-performance information will materially affect the award decision. For example, if an otherwise competitive offeror with adverse past-performance information offers a lower price than an offeror with excellent past-performance, the contracting officer should clarify the adverse past-performance information before awarding to the higher-priced offeror. This would result in a more informed and fair procurement process, and would ultimately help the government to achieve its goal of obtaining the best value.⁴⁸

Problem Area #2: Am I Ignoring Past-Performance Information That Is “Too Close At Hand”?

Another common procedural mistake agencies make in evaluating past-performance is failing to consider “super-relevant” information. Generally, agencies are not required to consider *all* possible past-performance information when conducting an evaluation. Moreover, agencies are not required to contact all of an offeror’s references listed in its proposal,⁴⁹ and need not contact the same number of references for each offeror.⁵⁰ Nevertheless, the GAO often deems some information to be “too close at hand” to be ignored during an evaluation of past-performance.⁵¹

In *GTS Duratek, Inc.*,⁵² the Navy solicited offers for the transportation and processing of Pearl Harbor Naval Shipyard’s (PHNS) radioactive waste. GTS Duratek’s proposal explained its performance on various similar Navy contracts, including a PHNS contract for “radioactive metal melting and recycling services.”⁵³ Nevertheless, the Navy neglected to consider the offeror’s performance on this contract in its past-performance evaluation because the offeror did not submit a Contractor Past Performance Data Sheet.⁵⁴ The GAO found the Navy’s actions unreasonable, noting that the contract was so relevant that it served as the basis of the government estimate. Concluding that this information was “too close at hand to ignore,” the GAO sustained the protest.⁵⁵

Similarly, in *Scientech, Inc.*,⁵⁶ the Department of Energy (DOE) neglected to solicit and evaluate a customer satisfaction

44. *See id.* at 8.

45. Comp. Gen. B-284049, Feb. 22, 2000, 2000 CPD ¶ 45.

46. *Id.* at 5.

47. *Id.* The GAO concluded in this case that the contracting officer exercised his discretion reasonably when deciding not to clarify the adverse past-performance information. *Id.*

48. The *OFPP Guide* suggests that agencies should consider allowing offerors to rebut all negative past-performance information, even when discussions are not anticipated, “in the interest of fairness.” *OFPP GUIDE*, *supra* note 7, at 25. *See also* Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora’s Box*, 29 PUB. CONT. L.J. 637, 666-68 (Summer 2000) (providing a more complete discussion of this issue).

49. *See* Black & Veatch Special Projects Corp., Comp. Gen. B-279492.2, June 26, 1998, 98-1 CPD ¶ 173 (finding agency’s decision to contact only two of protester’s fifteen references reasonable); Advanced Data Concepts, Inc., Comp. Gen. B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 (finding that agency acted reasonably by assigning a neutral rating to protester after none of the three agency contact points returned past-performance questionnaires).

50. *See* IGIT, Inc., Comp. Gen. B-275299.2, June 23, 1997, 97-2 CPD ¶ 7.

51. *GTS Duratek, Inc.*, Comp. Gen. B-280511.2, Oct. 19, 1998, 98-2 CPD ¶ 130, at 14.

52. *Id.*

53. *Id.* at 12.

54. The Request for Proposals advised offerors that the government would collect performance information using Past Performance Data Sheets, and that it might contact other references as well. *Id.*

55. *Id.* at 14.

56. Comp. Gen. B-277805, Jan. 20, 1998, 98-1 CPD ¶ 33.

questionnaire regarding the protester's incumbent contract.⁵⁷ The protester had clearly identified in its proposal the incumbent contract as the focal point of its past-performance and experience. The GAO found the incumbent contract remarkably similar to the solicited contract in scope of work, size, and type, and concluded that the DOE's failure to evaluate the protester's work on this contract was "patently unfair."⁵⁸

To avoid this pitfall, agencies must be sensitive to the existence of relevant past-performance information, and should err on the side of evaluating past-performance information rather than ignoring it. This applies not only to favorable information, but also to adverse information.⁵⁹ If the information is relevant, it will likely assist the agency in acquiring a more accurate picture of the offeror's past-performance history, thus resulting in better past-performance evaluations.

Problem Area #3: Am I Sticking to the Plan?

Agencies are required by statute to evaluate proposals according to the criteria specified in the Request for Proposals (RFP).⁶⁰ The GAO generally sustains protests of source-selection evaluations when the agency deviates from the criteria specified in the RFP.⁶¹ Past-performance evaluations are no exception. Thus, for example, if an agency states in the RFP that offerors with no prior contract experience in military contracts will be given a neutral rating, then giving such an offeror

anything other than a neutral rating contravenes the RFP and is improper.⁶²

In this area, perhaps more than any other, it is critical for agency personnel charged with drafting the RFP evaluation criteria to *say what they mean and mean what they say*. Agencies must choose past-performance subfactors wisely. The GAO is leery of creative reinterpretations of the RFP during the evaluation process, even when done for such noble purposes as to "promote efficiency."

In *Kathpal Technologies, Inc.; Computer & Hi-Tech Management, Inc.*,⁶³ the Department of Commerce (Commerce) issued an RFP for a government-wide acquisition contract in which the past-performance factor consisted of two subfactors—Quality Recognition/Certifications (QRC)⁶⁴ and Past Performance Management (PPM).⁶⁵ Due to an unexpectedly large number of proposals submitted, Commerce decided to screen all proposals to determine which were most competitive. Based only on the offerors' QRC subfactor ratings, the agency established a cut-off point, allowing only those offerors with sufficiently high QRC ratings to make oral presentations. Kathpal protested its elimination from the competition. The GAO had little difficulty finding that Commerce failed to consider Kathpal's proposal ratings under *all* stated past-performance evaluation criteria, and sustained the protest.⁶⁶

57. *Id.* at 3. The past-performance/experience criterion had two subcriteria—relevant past-performance and customer satisfaction. The protester submitted ten references, including references for the incumbent contract. The DOE sent customer satisfaction questionnaires to only four of the references, none of which pertained to the incumbent contract. *Id.* at 4-5.

58. *Id.* at 5. The GAO sustained the protest and recommended that the DOE include Sciencetech in the competitive range. *Id.* at 8. *Accord* Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560 (1999) (sustaining protest in which agency failed to consider protester's performance on incumbent contract even though protester provided references for the incumbent contract in its proposal); Int'l Bus. Sys., Inc., Comp. Gen. B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 (sustaining protest in which agency failed to consider contract with same agency, for the same services, and with the same contracting officer, and protester had asked that its performance of this contract be considered). *Cf.* Am. Dev. Corp., Comp. Gen. B-251876.4, July 12, 1993, 93-2 CPD ¶ 49 (finding agency's evaluation methodology unreasonable where it considered the relevance of prior contracts but failed to consider the quality of performance on those contracts).

59. *See* Airwork Ltd.-Vinnell Corp. (A Joint Venture), Comp. Gen. B-285247, Aug. 8, 2000, 2000 CPD ¶ 150 (stating that an agency generally may not ignore negative past-performance information of which it is aware).

60. *See* 41 U.S.C. § 253b(a) (2000).

61. *See, e.g.,* Found. Health Fed. Servs., Inc., Comp. Gen. B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3.

62. *See* Found. Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., Comp. Gen. B-278189.3, Feb. 4, 1998, 98-2 CPD ¶ 51. In this case, the GAO found that the agency's decision to deny a "bonus" to healthcare providers who lacked military experience "was not the equivalent of a required neutral rating," and recommended that the agency amend the solicitation to reflect its actual needs. *Id.* at 7-8, 16.

63. Comp. Gen. B-283137.3, Dec. 30, 1999, 2000 CPD ¶ 6.

64. The RFP indicated that the agency would evaluate the quality, relevance, and currency of the offerors' recognition or certification, with greater weight given to international or national quality performance awards. *Id.* at 3.

65. For this subfactor, the RFP explained that the agency would evaluate the offerors' past-performance in the management of complex information technology service efforts. *Id.*

66. *Id.* at 11, 15. The GAO noted that 41 U.S.C. § 253b(d)(2) and FAR section 15.306(c) now permit agencies to limit the competitive range to the "most highly rated proposals" for purposes of efficiency. Before establishing a competitive range, however, agencies must first evaluate all proposals received in accordance with the RFP evaluation criteria, including price. *Id.* at 11. *But cf.* IGIT, Inc., Comp. Gen. B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 (denying protest and excusing agency's "slight deviation" from solicitation criteria when the protester cannot show that the deviation caused prejudice).

Agencies should also be alert to RFP language stating that the agency will evaluate past-performance using prior contracts that are “the same or similar” to the present requirement. When such language is used, consideration of dissimilar or mildly similar prior contracts may be improper. For example, in *GTS Duratek, Inc.*,⁶⁷ the RFP stated that the Navy would evaluate past-performance under prior contracts for services that were the “same or similar in scope, magnitude, or complexity to this requirement” and would consider the quality of performance “relative to the size and complexity of the requirement under consideration.”⁶⁸ The evaluation board concluded that the awardee’s prior contracts were for “similar” work, and gave it an “excellent” rating, even though the awardee’s prior contracts included only a few of the services required by the RFP.⁶⁹ The GAO found that the Navy’s determination was based on a “ cursory” examination of these prior contracts, resulting in a failure of the Navy to comply with the RFP evaluation criteria.⁷⁰

Problem Area #4: Am I Evaluating Offerors on the Same Basis?

Agencies evaluating past-performance information must apply the same standards to all offerors. When an agency down-grades one offeror’s past-performance, it should down-grade similarly-situated offerors in the same way. Agencies may forget this common sense notion, with disastrous results. For example, in *Trifax Corp.*,⁷¹ the Army solicited offers for occupational health care services at various sites. The Army eliminated the protester’s proposal from the competitive range

primarily for its past-performance and insufficient quality control plan. After a close review of the record, the GAO found little support for any of the Army’s stated reasons for downgrading the proposal. Moreover, the GAO determined that offerors with similar past-performance histories received higher scores than the protester.⁷² Because of these inconsistencies, the GAO found the evaluation unreasonable and sustained the protest.⁷³

In a similar case,⁷⁴ the GAO found that the Department of Housing and Urban Development improperly downgraded the protester’s proposal for a lack of corporate experience while neglecting to do so with the awardee’s proposal. Both the protester and the awardee were newly-formed corporations whose principal officers had previous experience working for the same company. The agency credited the experience of the awardee’s key employees for the “corporate experience” factor, but failed to do so for any other offeror. The GAO found disparate treatment between the protester and the awardee, and sustained the protest.⁷⁵

Agencies should help ensure that they rate all offerors’ past-performance consistently by using the same evaluation form for all offerors. Failure to do so may lead to disparate treatment of the offerors. In *Seattle Security Services, Inc. v. United States*,⁷⁶ the court determined that the agency’s use of an evaluation form to assess the protester’s, but not the awardee’s, past-performance resulted in the awardee potentially receiving a higher past-performance score than it otherwise would have had.⁷⁷

67. Comp. Gen. B-280511.2, Oct. 19, 1998, 98-2 CPD ¶ 130.

68. *Id.* at 12.

69. *Id.* at 13.

70. *Id.* at 16. See also *NavCom Defense Elecs., Inc.*, Comp. Gen. B-276163, May 19, 1997, 97-1 CPD ¶ 189 (sustaining protest in which record failed to support agency’s conclusion that awardee’s past-performance involved contracts that were the “same as” or “similar to” the RFP requirements). But see *Amer. Dev. Corp.*, Comp. Gen. B-251876.4, July 12, 1993, 93-2 CPD ¶ 49 (holding that agency did not deviate from the evaluation factors by considering relevance because relevance is “logically encompassed by and related to the past-performance factor”).

71. Comp. Gen. B-279561, June 29, 1998, 98-2 CPD ¶ 24.

72. *Id.* at 7. The GAO cited an example. A competitor had three contracts of similar size and scope as the protester, including a health care contract of a smaller scale and an Army contract with “similar staffing problems” as the protester. *Id.* Despite these similarities, the competitor received a higher score than the protester. *Id.*

73. *Id.* at 8.

74. U.S. Prop. Mgmt. Serv. Corp., Comp. Gen. B-278727, Mar. 6, 1998, 98-1 CPD ¶ 88.

75. *Id.* at 6-7. In *Ogden Support Servs., Inc.*, Comp. Gen. B-270012.4, Oct. 3, 1996, 96-2 CPD ¶ 137, the GAO sustained a protest because the agency had given the awardee *too high* of a score for past-performance. The GAO concluded that the agency could not properly award an offeror with minimum relevant experience a nearly perfect score for past-performance because this would negate the evaluation weight assigned to past-performance criteria. *Id.* at 3-4.

76. 45 Fed. Cl. 560 (1999).

77. *Id.* at 569. The contracting officer evaluated the protester’s past-performance using the evaluation form, assigning the protester a score of ten. In contrast, the contracting officer evaluated the awardee’s past-performance based on three letters of reference contained in the awardee’s proposal, and assigned the awardee a score of eleven. The court determined that the use of the form would likely have resulted in a lower past-performance score for the awardee because one of its references rated the awardee’s performance “merely satisfactory.” *Id.*

The Court of Federal Claims found that the agency's actions prejudiced the protester and sustained the protest.⁷⁸

Problem Area #5: Am I Using the Right Prior Contracts?

Agencies must also consider the *right* contracts when evaluating an offeror's past-performance. In appropriate cases, agencies may consider the past-performance of predecessor companies, subcontractors, or even key employees.⁷⁹ Likewise, the agency may properly consider the past-performance of parent or subsidiary firms to the extent that a relationship exists between the two firms that may affect contract performance.⁸⁰ For offerors with no past-performance, agencies must assign a rating that is neither favorable nor unfavorable.⁸¹

Agencies must approach this area with caution. The key here is "relevance." The GAO will sustain a protest when an agency uses the past-performance of affiliated firms without showing the relevance of such firms to the present effort.⁸² Specifically, the agency must have information that the affiliated company intends to use its workforce, management, facilities, or other resources in performing the contract.⁸³ Agencies must do more than simply accept the offeror's statement taking credit for the performance of the affiliate. There must be some "actual or potential relationship to contract performance."⁸⁴

Problem Area #6: Am I Penalizing Any Offerors Unfairly?

The FAR defines past-performance broadly, to include the contractor's history of reasonable and cooperative behavior

and commitment to customer satisfaction.⁸⁵ This definition appears to give agencies the leeway to assign a negative evaluation to uncooperative or belligerent contractors. Nevertheless, agencies must tread carefully, avoiding any evaluation that appears to penalize an offeror for exercising its right to pursue legal remedies in good faith.

In *Nova Group, Inc.*,⁸⁶ the Navy solicited for pier-side construction projects at Pearl Harbor, Hawaii. The RFP advised that past-performance would be evaluated for customer satisfaction on similar projects.⁸⁷ The Navy gave the protester a "satisfactory" rating for past-performance, rather than "outstanding," because the protester had filed nine claims on prior contracts over a fifteen-year period.⁸⁸ The GAO found that this basis was unreasonable. Noting that the filing of claims is consistent with the statutory contract disputes process,⁸⁹ the GAO found no evidence in the record to suggest that the protester's claims lacked merit or had an adverse impact on contract performance. The GAO concluded that the Navy's action unfairly penalized the protester for utilizing the contract dispute process, and sustained the protest.⁹⁰

Problem Area #7: Am I Otherwise Being Reasonable in My Evaluation?

Generally, the GAO is deferential to the agency's evaluation of proposals, and does not question the evaluation unless shown by the protester to be unfair or unreasonable. Mere disagreement with the evaluation by the protester is insufficient grounds to sustain a protest.⁹¹ To prove unreasonableness, the protester must show some type of serious error meriting relief.⁹²

78. *Id.* at 571.

79. See FAR, *supra* note 3, § 15.305(a)(2)(iii); see also Myers Investigative & Sec. Servs., Inc., Comp. Gen. B-286971.2, April 2, 2001, 2001 CPD ¶ 59 (holding that agencies may consider a proposed subcontractor's experience when evaluating an offeror's past-performance, unless language in the RFP prohibits such consideration).

80. See NAHB Research Ctr., Inc., Comp. Gen. B-278876.2, May 4, 1998, 98-1 CPD ¶ 150, at 4.

81. FAR, *supra* note 3, § 15.305(a)(2)(iv).

82. Universal Bldg. Maint., Inc., Comp. Gen. B-282456, July 15, 1999, 99-2 CPD ¶ 32.

83. *Id.* at 6.

84. ST Aerospace Engines Pte. Ltd., Comp. Gen. B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161, at 5.

85. FAR, *supra* note 3, § 42.1501.

86. Comp. Gen. B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56.

87. *Id.* at 2. The RFP advised that the Navy would measure customer satisfaction by "quality of workmanship; timely completion of work; reasonableness of price; cooperation/responsiveness and safety." *Id.*

88. *Id.* at 3-4. The Navy reasoned that the protester's failure to reach bilateral agreements on those prior contracts raised questions about customer satisfaction and the protester's cooperation/responsiveness. *Id.* at 9.

89. See Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000).

90. 99-2 CPD ¶ 56, at 9.

While the above rules make it appear that protesters have a difficult burden to overcome, protesters have been increasingly successful in persuading the GAO to find flaws in agency evaluations. To survive a protest, agencies must be able to demonstrate a reasonable basis for evaluating an awardee's past-performance. Legal advisors have a crucial role to play here, ensuring that procurement officials are acting not only legally, but using good judgment. Attorneys should review the evaluation narrative to ensure it is supported by sufficient evidence.

While the GAO may be reluctant to second-guess an agency's past-performance evaluation, it will sustain a protest when it considers the agency's supporting rationale for the source-selection decision to be inadequate. For example, the GAO found HUD's award decision to be unreasonable in *ACS Government Solutions Group, Inc.*⁹³ In this procurement of comprehensive loan servicing for single family homes, the evaluation board concluded that the awardee had extensive experience in this line of business and awarded it a "near perfect score."⁹⁴ The GAO examined the record and found insufficient evidence to support this conclusion, as nearly all of the awardee's experience pertained to work other than loan servicing, or to loan servicing of small consumer loans.⁹⁵

In *Pacific Ship Repair and Fabrication, Inc.*,⁹⁶ the Navy issued questionnaires to agency contracting personnel for eleven contracts listed in the protester's proposal. The personnel receiving these questionnaires declined to rate the protester's performance on four of these contracts.⁹⁷ Despite this lack of rating or other information, the Navy assigned a satisfactory rating to these contracts. The GAO held this was

improper, finding that the Navy had a duty to acquire information adequate to support an evaluation once it decided to include these contracts within the scope of its past-performance rating.⁹⁸

When reviewing past-performance evaluations, attorneys should also ensure that agencies make valid comparisons among offerors' performance records when assigning ratings. Invalid comparisons may result in unreasonable evaluations. In *Green Valley Transportation, Inc.*,⁹⁹ the GAO sustained a protest against the Army's award of numerous freight transportation contracts. The Army evaluated the past-performance of the offerors primarily by examining "negative performance actions" by the shippers and the corrective measures they took in response.¹⁰⁰ The Army neglected, however, to compare the number of negative actions against the number of shipments the offerors made over the relevant time period. The protester had made many more shipments than other offerors, and therefore had many more negative actions in its record, resulting in a lower score than other offerors. But if one counted the protester's total negative actions as a percentage of the total number of shipments it had made, the protester's history appeared much more favorable.¹⁰¹ The GAO found the Army's method of comparison to be irrational and sustained the protest.¹⁰²

In *Beneco Enterprises, Inc.*, a recent case involving an RFP for job-order construction services at Fort Rucker, Alabama, the GAO rebuked the Army for unreasonably selecting an offeror with a minimal record of relevant past-performance.¹⁰³ The Army evaluated the awardee as having "good to excellent" past-performance with low risk, the same evaluation as the pro-

91. *Id.* at 6; *see also* Parmatic Filter Corp., Comp. Gen. B-285288.3, Mar. 30, 2001, 2001 CPD ¶ 71.

92. Nova Group, Inc., Comp. Gen. B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56.

93. Comp. Gen. B-282098, June 2, 1999, 99-1 CPD ¶ 106.

94. *Id.* at 3-4. The evaluation board based its decision almost entirely on the experience of the awardee's proposed key personnel, rather than on the firm's corporate experience. The GAO found, on the contrary, that the RFP "contemplated a separate evaluation of corporate and key personnel experience." *Id.* at 10.

95. *Id.* at 10-13; *see also* Mech. Contractors, S.A., Comp. Gen. B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121 (finding an evaluation of protester's experience unreasonable because agency failed to give any weight to subcontractor's certification to perform the work); PMT Servs., Inc., Comp. Gen. B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98. In *PMT*, the agency evaluated the protester's past-performance as "marginal," with a probability of success as "poor," solely because the protester had not previously performed a contract of similar size and complexity. *PMT Servs.*, 96-2 CPD ¶ 98, at 3. The GAO found this determination unreasonable because the agency failed to take into account any factors relating to complexity other than size, noting that size was not necessarily related to greater complexity. *Id.* at 6-9.

96. Comp. Gen. B-279793, July 23, 1998, 98-2 CPD ¶ 29.

97. *Id.* at 5. The respondents were unable to locate knowledgeable contracting personnel or past-performance records documenting the protester's performance. *Id.*

98. *Id.* Despite the Navy's "unreasonable" evaluation, the GAO refused to sustain the protest, finding that the protester failed to show it was prejudiced by the Navy's action. The GAO had offered the protester the opportunity to submit evidence that its performance was better than satisfactory, but the protester declined this invitation. *Id.* at 5-6.

99. B-285283, 2000 U.S. Comp. Gen. LEXIS 122 (Aug. 9, 2000).

100. *Id.* at *9.

101. The GAO noted that over a three-year period, the protester made 39,441 shipments of about 155 million pounds. The Army gave another offeror the same past-performance rating as the protester, though it had made only 760 shipments of 12 million pounds during the same period. The Army's evaluation focused only on the absolute number of performance problems, failing to "take into account the size of the universe of performance in which those problems occurred." *Id.* at *12.

tester, even though the awardee had significantly less experience in job-order contracts than the protester.¹⁰⁴ The Army reached this conclusion by evaluating the past-performance and experience of the awardee's senior project manager, something the RFP allowed only for "new entities," those without previous experience in contracts of that kind.¹⁰⁵ The record showed that the awardee was anything but new.¹⁰⁶ The record also failed to demonstrate that the Army had adequate information to evaluate the awardee's personnel.¹⁰⁷ In a harshly worded opinion,¹⁰⁸ the GAO concluded that the Army's evaluation was "fundamentally flawed."¹⁰⁹

Problem Area #8: Have I Explained the Award Decision Adequately?

After the contracting officer reasonably evaluates and documents the offerors' past-performance, the agency may still need to complete one more level of analysis before selecting the win-

ning bid. The FAR permits agencies to make a cost/technical tradeoff.¹¹⁰ Agencies have broad discretion in making such determinations, and the GAO normally will defer to the agency decision unless it is clearly unreasonable. Thus, an agency is free to award to a higher-priced offeror with better past-performance, but it *must* be able to provide a reasonable explanation for doing so.¹¹¹ The GAO will sustain a protest when the agency makes only conclusory statements of the tradeoff decision.¹¹²

The tradeoff decision must demonstrate the relative difference among proposals, their weaknesses and risks, and the basis for the selection decision.¹¹³ Failure to do so might be reversible error, even for simplified acquisitions. In *National Aerospace Group, Inc.*,¹¹⁴ the Defense Logistics Agency (DLA) solicited quotes for sheet metal using simplified acquisition automated purchase procedures that contemplated a best-value assessment. The contracting officer awarded the contract to an experienced vendor with a high quote, using an Automated

102. *Id.* The GAO also based its decision on the Army's failure to document its "reasoned analysis of the past-performance information at its disposal," as required by the RFP, and its failure to consider the volume of deliveries made by the offerors when evaluating the percent of "on-time deliveries" made. *Id.* at *22-23. See also *OSI Collection Svcs., Inc.*, Comp. Gen. B-286597, Jan. 17, 2001, 2001 CPD ¶ 18. In *OSI Collection Services*, the GAO sustained a protest involving a federal supply schedule task-order contract for private collection services, in which the agency based its past-performance evaluation primarily on Competitive Performance and Continuous Surveillance (CPSC) scores on previous collection contracts. The CPSC scores measured the relative performance of each contractor on four performance indicators, including "net back recovery" and "number of litigation packages prepared." *Id.* at 7. The GAO found the agency's "overly mechanical application" of the CPSC scores unreasonable because the agency failed to consider how the differing workloads assigned to the private collection contractors might impact their CPSC scores. *Id.* at 8-9.

103. *Beneco Enters., Inc.*, Comp. Gen. B-283512.3, July 10, 2000, 2000 CPD ¶ 176. This was the GAO's second decision on this procurement; the GAO had previously sustained Beneco's protest of the Army's evaluation of the awardee's past-performance. In the earlier protest, the GAO found that the Army unreasonably gave the awardee an excellent rating even though it had no job-order prime contractor experience, while giving Beneco only a good rating despite its extensive record of successful performance under job-order contracts. See *Beneco Enters., Inc.*, Comp. Gen. B-283512, Dec. 3, 1999, 2000 CPD ¶ 175, at 9-10.

104. 2000 CPD ¶ 176, at 6. The protester, Beneco, was the incumbent job-order contractor at Fort Rucker. It submitted information in its proposal regarding its performance on eighteen contracts, fifteen of which were considered "highly relevant job-order-type contracts." *Id.* at 4.

105. *Id.* at 5. The awardee's senior project manager had served as "the top on-site manager" for Beneco's incumbent job-order contract at Fort Rucker. *Id.* The awardee stated in its proposal that this senior project manager had ten years of "direct JOC experience," and had impacted twenty job-order contracts with "superior performance." *Id.*

106. *Id.* at 7. The awardee's proposal listed many contracts it had been awarded for projects similar to the work required by the RFP. Some of these contracts dated back over six years. *Id.* at 7 n.3.

107. *Id.* at 8. The GAO found that the Army "accepted without support" the awardee's statement that its project manager had "impacted with superior performance" over twenty unidentified job-order contracts. *Id.*

108. The GAO found that the Army's actions "repeatedly favored [the awardee] without a reasonable basis" and "cast a shadow over the integrity of this procurement process." *Id.* at 8 n.9.

109. *Id.* at 9. In sustaining the protest, the GAO recommended that the Army appoint a new source-selection evaluation board and source-selection authority to conduct a new evaluation of proposals. *Id.* Cf. *Airwork Limited-Vinnell Corp. (A Joint Venture)*, Comp. Gen. B-285247, Aug. 8, 2000, 2000 CPD ¶ 150. In *Airwork Limited*, the GAO found that the agency reasonably evaluated the protester and the awardee as both having exceptional past-performance, even though the protester was the incumbent contractor. The GAO determined that the agency was not required to reduce the exceptional rating assigned to the awardee—even if the protester's past-performance was better. *Id.* at 9.

110. FAR, *supra* note 3, § 15.308.

111. See *Numura Enter., Inc.*, Comp. Gen. B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148.

112. See *Si-Nor, Inc.*, Comp. Gen. B-282064, May 25, 1999, 2000 CPD ¶ 159.

113. See *ACS Gov't Solutions Group, Inc.*, Comp. Gen. B-282098, June 2, 1999, 99-1 CPD ¶ 106.

114. Comp. Gen. B-281958, May 10, 1999, 99-1 CPD ¶ 82.

Best Value Model (ABVM).¹¹⁵ The contracting officer based his award decision on a determination that the awardee represented a lesser risk of nonperformance than the protester, a relatively new supplier who had received a neutral rating. The DLA presented no evidence, however, to show that the contracting officer ever performed a comparative assessment of vendors or a price/performance tradeoff. The GAO found this violated 41 U.S.C. § 405(j)(2) and FAR section 15.305(a)(2), and sustained the protest.¹¹⁶

Conclusion

Past-performance evaluations during contract source-selection are now an important part of the selection process, and they will remain so for the foreseeable future. Agencies will continue to use this tool to measure the risk of non-performance more effectively, and non-selected contractors will continue to mount challenges to these necessarily subjective evaluations in the courts and at the GAO. Legal advisors must be alert to the problem areas that have plagued source-selections in the past, and advise agencies accordingly. By remembering the bedrock principles of source-selection evaluations—reasonableness, fairness, and consistency—agencies can minimize both the basis and incentive for contractor protests. This would go a long way toward building a more efficient procurement system.

115. *Id.* at 2. The ABVM is an “automated system that collects a vendor’s past-performance data for a specific period and translates it into a numeric score.” *Id.*

116. *Id.* at 4.